Supreme Court, U.S.
FILED
NOV 25 1992
OFFICE OF THE CLERK

No. 92-722

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SPENCER GIFTS, INC.,
Petitioner,

v.

JOHN D. OLITSKY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

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November 25, 1992

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QUESTION PRESENTED (RESTATED)

Must a district court in a civil trial, as a matter of law, despite proper curative instructions, grant a motion for mistrial where the jury hears testimony disclosing the result of a previous trial?

LIST OF PARTIES AND RULE 29.1 LIST

The caption lists the parties before the court of appeals and this Court. Spencer Gifts, Inc.'s parent company is MCA, Inc. Spencer Gifts, Inc.'s only non-wholly owned subsidiary is Matsushita Industrial Electrical Company, Ltd.

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BRIEF IN OPPOSITION

Respondent John D. Olitsky opposes the request for a writ of certiorari by Petitioner Spencer Gifts, Inc. to review the Opinion and Order of the United States Court of Appeals for the Fifth Circuit, rendered on June 22, 1992.

OPINIONS BELOW

The court of appeals opinion is reported at 964 F.2d 1471 (5th Cir. 1992). The Fifth Circuit's order denying rehearing issued July 28, 1992 is attached to Spencer's Petition for Writ of Certiorari (Pet. App. at 33a-34a). The district court did not render a written opinion; oral rulings in the trial transcript are at Pet. App. at 20a-32a.

JURISDICTION

Respondent John D. Olitsky (hereinafter "Olitsky") adopts Spencer's statement of jurisdiction.

STATEMENT OF THE CASE

A. The First Trial, Appeal, and Reversal

The 1987 trial resulted in a jury finding of willful age discrimination by Spencer. In addition, the district court found that Spencer discharged Olitsky for the purpose of interfering with the attainment of rights to which Olitsky would have become entitled under Spencer's employee benefit plan, in violation of the Employment Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140. On appeal, the Fifth Circuit ruled that the admission of the EEOC file containing the handwritten notes of an EEOC agent who quoted an admission against interest by Spencer's in-house counsel, violated Section 706(b) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e-5(b) (pertaining to the inadmissibility of conciliation matters).

B. Discovery for the Second Trial

Spencer's discovery did not call for Olitsky to disclose his conversation with Bruce Shouting about the result of the first trial. Olitsky was responsive to Spencer's discovery requests. Spencer asked Olitsky to detail his efforts to secure employment, but neither in his deposition nor in Spencer's interrogatories did Spencer ask Olitsky to state the reasons he had had difficulty in finding employment since his termination at Spencer Gifts in 1983, nor since the first trial.

C. The Second Trial

Spencer filed a voluminous Motion in Limine and Supplement before the second trial (R. Vol. K. pp. 001-145; 2027-2260), yet failed to address testimony about the fact and result of the first trial. When Olitsky's counsel referred to the previous trial in opening statement (Tr. II, 22), Spencer failed to object.

At least four times during Spencer's opening argument, Spencer's counsel suggested that Olitsky's inability to find another job as an executive after his termination at Spencer and a short period of employment with another company supported Spencer's defense that Olitsky was a poor performer who was fired for that reason, not age discrimination (Tr. II, 38-39, 41, 45-46, 47). Spencer's counsel made an analogy that Olitsky's job history proved that he was a bad performer, let go for that reason by Spencer since he was like a baseball pitcher who has reached the point where "he is let go from one team to another until there comes a point where he can't find a job as a pitcher for anyone anymore . . ." (Tr. II, 47). Although Spencer's counsel at first told the jury Spencer did not intend to prove Olitsky was not working to find other work (Tr. II, 39), when the district court asked specifically whether Spencer was dropping its contention that Olitsky failed to mitigate damages, in the words of the district court, Spencer's counsel "danced around that question" (Tr. II, 219) twice (Tr. II, 154-55, 219-221), and in the end, Spencer submitted the mitigation issue to the jury (R. 2524, 2541).

With Olitsky as a witness, his counsel referenced Spencer's opening statement that Olitsky had not obtained other employment and asked what kinds of problems he had encountered that had kept him from getting high-level employment since his termination at Spencer and since the first trial of the case. Pet. App. at 22a. Olitsky replied that (1) he kept getting older, and (2) "also, since the first trial it is more difficult because the entire gift industry is aware I won that case for a large amount of money." *Id.* at 23a. Spencer's attorneys made no objection or motion to strike. Nor did Spencer's counsel request a cautionary instruction. Spencer's counsel said:

> Your honor, we'll need to take this up outside the jury's presence, and I think we are going to move for a mistrial on this case.

Id. The district court denied Spencer's motion for mistrial (Pet. App. at 29a). The trial court commented upon the "relaxed attitude" of Spencer's counsel concerning a point it now claimed to be highly prejudicial, noting the failure to address the fact and result of the previous trial in Spencer's Motion in Limine and failure to object when Olitsky's counsel made an explicit reference to the previous trial in opening statement. Pet. App. at 24a-31a. At the bench conference, Olitsky's counsel suggested the court could instruct the jury not to consider the previous trial. Pet. App. at 19a.

The district court recalled the jury and immediately instructed them:

> [Y]ou have heard testimony about a previous trial of this case. The fact that this is the second trial is irrelevant to your consideration of this case. You should not consider the fact of a previous trial or its outcome in any way. Your verdict in this case must be based solely upon the facts as you find them from the evidence introduced at this trial with the law as I shall give to you during the trial at the end of the case.

Pet. App. at 31a-32a. Again, before the jury retired to deliberate, the district court instructed:

> You have heard that there was a previous trial of this case. Except for testimony from that trial which has been admitted as evidence in this trial, you should disregard everything about that earlier trial in reaching your verdict in this case. Common sense will tell you that the adjudication from the earlier trial must have been flawed; otherwise, we would not have spent all of the time and effort required by this trial to determine the rights and liabilities of the parties. If you should allow the fact of the previous trial or its outcome to influence you, that would be improper, and all of the time and effort spent on this trial will have been wasted.

R. 2520-21.

After the jury returned, and having just been told that this testimony would be called for by Olitsky's counsel (Pet. App. at 28a-29a), counsel asked Olitsky about a comment to him concerning publicity from the first trial. Olitsky responded, but Spencer made no objection, no motion to strike, and did not renew its motion for mistrial. Pet. App. at 32a.

The second trial lasted from September 25 through October 4, 1990. The jury returned a finding of willful age discrimination by Spencer. In addition, the district court found Spencer discharged Olitsky for the purpose of interfering with the attainment of rights to which Olitsky would have been entitled under Spencer's employment benefit plan in violation of ERISA.

D. Decision on Appeal

On appeal Spencer argued that regardless of curative instructions, a district court must grant a motion for mistrial where the jury hears testimony disclosing the result of a previous trial.

The Fifth Circuit affirmed, without directly addressing two of Olitsky's assertions—that Spencer failed to preserve error and that the testimony concerning the result of the first trial was relevant and admissible. The Fifth Circuit did not conclude that the trial court abused its discretion under Rule 403, F.R.E., by admitting the testimony. The Fifth Circuit concluded that even if the testimony was improperly before the jury, "the disclosure of the result of the first trial did not prejudice Spencer to the extent that Spencer would have us believe." Pet. App. at 8a. The court held that the curative instructions given by the district court "negated any prejudice that may have occurred." Pet. App. at 8a-9a. The Fifth Circuit reasoned further that Spencer was at least partly to blame for the disclosure because it "danced around" the district court's question about whether it contended Olitsky failed to mitigate damages and failed to raise the

issue in its motion in limine. Pet. App. at 8a.[1] Finally, the court of appeals noted a case relied upon by Spencer involved criminal trials with "constitutional overtones," and as such is "at best weakly analogous in civil cases." Pet. App. at 9a.

REASONS FOR DENYING THE PETITION

This case does not present any of the considerations that warrant Supreme Court review. There is no conflict among the lower courts in need of resolution, nor does the decision below establish any rule of special importance or general application. The decision below simply holds that, under the circumstances of this case, the drastic remedy of a mistrial was unnecessary because curative jury instructions were a sufficient remedy "for any harm that may have resulted from the mention of the first trial and its results." Pet. App. at 9a. It is well-established that the fact-specific considerations involved in assessing such claims that evidence is unduly prejudicial, and the proper cure, are appropriately left to the discretion of the lower courts. This action does not present any unusual or special considerations that warrant review of the district court's and Fifth Circuit's evaluation that cautionary instructions were sufficient under the circumstances presented.

The Petition's claims that the "ruling" is absurd, "the Fifth Circuit's ruling will wreck havoc among litigants and for the courts, . . . [and] spell disaster for the courts" by forcing them to "either rule on voluminous pretrial motions, or, more probably, to put over until trial *all* evidentiary issues," Pet. for Cert. at 14-15 (emphasis in original), are exaggerations founded on the Petition's mischaracterization of the holding of the decision below in both the questions presented in the petition. Spencer

[1] The Fifth Circuit also mentioned that the district court had "noted that Spencer had allowed Olitsky to refer to the prior trial in his opening statement without objection . . . ." Pet. App. at 5a.

added that the Fifth Circuit's holding "also places a new premium on tactics of misleading opponents about what evidence will be introduced." [2] The Fifth Circuit cautioned Spencer's attorneys against this kind of argument in denying its Petition for Rehearing. Pet. App. at 34.

First, in affirming the district court, the Fifth Circuit did not hold that a litigant must file a motion *in limine* in order to preserve its claim that the jury's exposure to testimony concerning the results of the first trial required that the Court declare a mistrial. Indeed, the Fifth Circuit did not even reach the issue of whether the error was preserved or whether the testimony was admissible. It merely found that the district court properly concluded that, if there was prejudice, curative instructions were an adequate remedy, and that Spencer's failure to raise the issues in its *in limine* motions supported this conclusion.

Second, the Fifth Circuit did not hold that evidentiary rulings in criminal cases are not binding in civil cases, as Spencer argues. The issue is not remotely presented by this case because there are no criminal decisions that establish a *per se* rule that a mistrial must always be granted in the circumstances presented here. The decision below found that the criminal cases Spencer relied upon were distinguishable on their facts and remarked that, in the context of deciding whether cautionary instructions are a sufficient remedy for prejudice in a civil jury trial, criminal cases are "at best weakly analogous." Apart from the fact that this observation was plainly

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[2] Although Spencer's Petition for Certiorari states as a fact that Olitsky was not responsive in discovery, Olitsky contends the facts are to the contrary. Neither the district court nor the Fifth Circuit ruled that Olitsky in any way mislead Spencer about what evidence would be introduced. At the trial court Spencer's attorneys attempted to blame their failure to include this issue in their motion in limine on the Official Court Reporter. Spencer asserted it had somehow obtained a pretrial ruling from the court reporter that the prior trial would not be mentioned. Pet. App. at 24a-31a.

correct, it does not present any issue that warrants review by this Court.

Spencer has not made a showing that this Court should grant review on Writ of Certiorari for reasons contained in Rule 10, S.C.R. The Fifth Circuit's decision does not depart in the slightest from the accepted and usual course of judicial proceedings. Ironically, it is Spencer that seeks a ruling that would have adverse consequences for the courts—a ruling that a district court's hands are tied and that a mistrial must be granted where the result of the first trial is disclosed, regardless of curative instructions, and regardless of the circumstances under which the results of the first trial were disclosed to the jury.

I. THE FIFTH CIRCUIT DID NOT RULE THAT SPENCER GIFTS' FAILURE TO FILE A MOTION IN LIMINE CONSTITUTED A FAILURE TO PRESERVE ERROR

The first question presented by the Petition does not provide a basis for review because the Fifth Circuit did not rule that Spencer's failure to file a motion *in limine* constituted a failure to preserve the error. Spencer begins this section of its Petition for Writ of Certiorari with a colossal misstatement that "[i]t is unquestioned that Plaintiff Olitsky's testimony about the size of the jury verdict in the first trial of this case was highly prejudicial, and that corrective instructions by the trial court are inadequate to counteract the inflammatory and prejudicial evidence." The Fifth Circuit did not specifically rule upon Olitsky's contention that this testimony was admissible based upon Spencer's defense that Olitsky had not mitigated his damages and its argument that it fired Olitsky not because of his age, but because of his performance—that he was like a worn out baseball pitcher, as shown by his failure to find and hold executive employment after being terminated at Spencer. However, Fifth Circuit repeatedly couched its comments in terms

of "any prejudice that may have occurred," Pet. App. at 8a-9a, and concluded that any such prejudice was cured by the cautionary instructions and did not require a mistrial.

Because the Fifth Circuit did not rule that a motion in limine is necessary to preserve error, it is unnecessary to pursue Spencer's lengthy discussion about the propriety of such a holding. Meanwhile, ample authority supports the action of the district court and affirmance by the Fifth Circuit. The Fifth Circuit did not decide whether the testimony was relevant and admissible, but concluded that in any event, the trial court does not abuse its discretion in denying a motion for mistrial by considering, *inter alia*, Spencer's relaxed attitude toward these issues, as evidenced by its failure to object to a mention of the previous trial in plaintiff's opening statement and its failure, despite filing a voluminous motion in limine, to include this among the points. A comment about the *result* of the first trial is only a breath away from a comment about the *fact* of the first trial. A trial court may properly exercise discretion by concluding that a matter is not so highly prejudicial where a party shows no concern about a comment to the jury that there has been a previous trial.

Beyond this, the testimony was admissible. It was relevant to the issues of pretext and mitigation of damages and balancing its relevance and potential prejudice is properly left to the discretion of the district court. Olitsky testified that part of his difficulty finding work since the last trial was because of the publicized success at the first trial. As the district court noted, this "does [tend] to support an inference that the existence of that first trial was known in the gift industry" (Pet. App. at 26a-27a) and an argument that it had a chilling effect on Olitsky's ability to find employment in that industry is relevant. Where Congress has enacted major litigation to prohibit employer discrimination against

applicants because they have opposed age discrimination, ADEA, 29 U.S.C. § 623(d), Olitsky's well-known opposition to age discrimination by means of a successful lawsuit may have triggered a chilling effect on his employability in the industry. The Fifth Circuit will not reverse a district court's Rule 403, F.R.E., decision absent a clear abuse of discretion. See *Wright v. Hartford Accident and Indem. Co.*, 580 F.2d 809, 819 (5th Cir. 1978) (per curiam). Since Rule 403 expressly contemplates a balancing test in determining the admissibility of challenged evidence, "reversible error is found only in exceptional circumstances." *F&S Offshore, Inc. v. K.O. Steel Casting, Inc.*, 662 F.2d 1104, 1107 (5th Cir. 1981) (per curiam).

II. THE FIFTH CIRCUIT'S HOLDING IS NOT THAT EVIDENTIARY RULINGS IN CRIMINAL CASES DO NOT APPLY IN CIVIL CASES, AND ITS HOLDING IS NOT INCONSISTENT WITH CASES DECIDED BY THIS COURT

Spencer asserted that reversal was required by *United States v. Williams*, 568 F.2d 464 (5th Cir. 1978). The Fifth Circuit distinguished its decision in *Williams* because the trial court gave only the standard admonition to the jury to disregard everything not heard in court and gave no specific instruction to the two jurors who admitted they had seen a news report that the criminal defendant and his three co-defendants were convicted in a jury trial to disregard the news report. The Fifth Circuit stated:

> In the instant case, however, the district court clearly instructed the jury on two occasions that the first trial was irrelevant and that the jury was not to consider the occurrence or result of the first trial for any purpose. We conclude that those instructions were sufficient to cure any harm that may have resulted from the mention of the first trial and its results.

Pet. App. at 9a. The Fifth Circuit commented, "such evidentiary rulings in criminal trials, with their constitu-

tional overtones, are at best weakly analogous in civil cases." Pet. App. at 9a.

In arguing that the Fifth Circuit held that evidentiary rulings in criminal cases are not binding in civil cases, Spencer uses its straw man technique. While the question of whether evidentiary rulings in criminal cases, with constitutional overtones, are directly applicable and controlling in civil cases, may be worth of law review comment, this was not the holding in *Olitsky II* and the issue is not ripe for review by this Court. Moreover, the issue does not justify review of the Fifth Circuit's holding for two reasons. First, no decision of the Fifth Circuit or this Court, criminal or civil, holds that mention of the result of a previous trial is automatic grounds for a mistrial and cannot be cured with curative instructions, such as those given here. The Fifth Circuit did not decline to follow the criminal cases cited by Spencer solely on the basis that they were criminal cases, but distinguished them on their particular facts because, in this case, the prejudice to Spencer was not as great, and specific curative instructions were given. Pet. App. 8a-9a. Second, the Fifth Circuit did not declare, as Spencer claims, that different evidentiary rules apply in civil and criminal cases, but accurately observed that decisions concerning evidentiary rulings in criminal and civil trials may involve different considerations where, as here, a discretionary balancing of relevance and prejudice is at issue.

There is no "automatic new-trial" rule for mentioning the result of the previous trial even in evidentiary rulings in criminal trials (with constitutional overtones). In *Daniel v. United States*, 268 F.2d 948, 851-52 (5th Cir. 1959), the Fifth Circuit ruled that there there is no evidence indicating otherwise, the jury is "presumed to have complied with the Court's instruction." Indeed, the cautionary instruction in this case was not requested by Spencer; Olitsky's counsel suggested the instruction.

It has been held that a cautionary instruction is ordinarily not required unless requested by counsel. *United States v. DeCarlo*, 458 F.2d 358 (3d Cir. 1972), *cert. denied*, 409 U.S. 843; *United States v. Nasta*, 398 F.2d 283 (2d Cir. 1968). *See also United States v. Prieto*, 505 F.2d 8 (5th Cir. 1974) (when objection to opening statement was sustained and no further relief requested, this was sufficient). Moreover, the Fifth Circuit has held that an inadvertent showing that the defendant was on parole could have been corrected by a cautionary instruction, and when the defendant refused a cautionary instruction on grounds that it would given undue emphasis to the situation, he could not complain of prejudicial error on appeal. *Tillery v. United States*, 396 F.2d 790 (5th Cir. 1968).

The frivolous nature of Spencer's Petition for Certiorari, is illustrated by the fact that a pattern jury instruction for criminal cases states:

> You [have heard] [will hear] that this is the second trial of this case. You should not, however, concern yourself with this fact.
>
> Your verdict must be based solely on the evidence in the present trial in accordance with the Court's instructions without any regard to what may have occurred earlier.

Federal Jury Practice and Instructions, Civil and Criminal, 4th Ed., Vol. I., § 10.08 (1992). Since a criminal defendant who is acquitted generally may not be tried again, this pattern jury instruction for criminal cases completely undercuts Spencer's assertion that a mention of the result of the first trial in a criminal case mandates a mistrial regardless of cautionary words from the court. Where a prosecutor mentions during voir dire that there has been a prior trial, the situation is properly corrected by the court's cautionary instructions. *United States v. Hykel*, 461 F.2d 721, 726 (3d Cir. 1972). Moreover, the Fifth Circuit's ruling that in this civil case a mistrial

need not be granted despite curative instructions is fully supported by its ruling in *Panama Electric Co. v. Moyers*, 259 F. 219 (5th Cir. 1919), that it was reversible error for the plaintiff's attorney to mention the result of a previous trial where the defendant requested the trial court to instruct the jury to disregard the remarks and the trial court *declined* to so instruct. *Id.* at 220.

Besides its straw man technique, Spencer takes liberties with the Fifth Circuit's comment that evidentiary rulings in criminal trials have constitutional overtones and are at best weakly analogous in civil cases. Pet. for Cert. at 15-17, *citing* Fifth Circuit decision, Pet. App. 9a. Spencer claims the Fifth Circuit's "ruling . . . is inconsistent with the *cases* decided by this Court." Pet. for Cert., p. 15 (emphasis added). In support of this claim, Spencer cites one 1827 decision of this Court concerning an indictment under the Slave Trade Act. *United States v. Gooding*, 25 U.S. 12 Wheat. 467 (1827). Moreover, Spencer's citation of *Gooding* and its citation of the Fifth Circuit's 1930 decision in *Kercheval v. United States*, 36 F.2d 766, 767 (5th Cir.), *cert. denied*, 281 U.S. 745 (1930), merely stand for the proposition that in general the rules of evidence in criminal and civil cases are the same.

There is no inconsistency between the proposition that the same evidentiary rules govern criminal and civil cases and the Fifth Circuit's observation in this case that the *application* of those rules in criminal decisions provides only a weak analogy when considering the proper result in civil cases. Whether potential prejudice can be cured by a cautionary instruction or requires a mistrial is a discretionary determination that requires that the trial court weight a variety of factors, including the particular facts involved, how central the alleged prejudice is to the issues in the case, the burden of proof, and whether constitutional rights are implicated. These factors, particularly the burden of proof and constitutional rights, obvi-

ously differ in civil and criminal cases.[3] Consequently, the Fifth Circuit's observation that the criminal precedents concerning balancing relevance and prejudice are "at best weakly analogous" is entirely appropriate, even though the comment did not constitute the holding of *Olitsky II*.

CONCLUSION

For the reasons stated herein, the Peitition for Writ of Certiorari should be denied.

Respectfully submitted,

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[3] In *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 926 (3d Cir. 1985), the Third Circuit recognized that the Eighth and Ninth Circuits apply different harmless error standards in civil cases compared to criminal cases. *Id.* at 925. More importantly, the Third Circuit in *McQueeney* recognized and approved the "well-recognized and long-standing" distinction between harmless error standards for constitutional and non-constitutional errors. *McQueeney, supra*, at 925, n.14, citing with approval the Fifth Circuit holding on this point, *United States v. Valdez*, 722 F.2d 1196, 1204 (5th Cir. 1984).